

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/18/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2002-000159

FILED: _____

STATE OF ARIZONA

DIANA C HINZ

v.

JEFFREY WILSON EVERSULL

CRAIG W PENROD

FINANCIAL SERVICES-CCC
PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5856369

Charge: 1. DUI/ALCOHOL OR APC
2. DUI W/A.C. OF .10 OR HIGHER
3. EXTREME DUI

DOB: 05/10/65

DOC: 05/31/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial Court, exhibits made of record and the Memoranda submitted.

In the case at hand, Appellant was given a breath test on the Intoxilyzer 50000-EN and subsequently charged with 3 DUI offenses on May 31, 2001. Appellant comes before this court to appeal the Phoenix City Court's denial of his motion to suppress breath test results, based on the fact that police officers did not collect a separate breath sample for the Appellant. Appellant argues that the Intoxilyzer 5000 used to test his breathe failed both before and after calibration checks immediately following Appellant's test and, therefore, the police should have collected a breath sample for the Appellant.

In Moss v. Superior Court In and For County of La Paz,¹ the court ruled that due process does not require the state to provide DUI defendants with separate additional breath samples for independent testing, when replicate tests on blood alcohol testing equipment, such as the Intoxilyzer 50000-EN, are employed:

Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the state to provide defendants with breath samples. In light of the acknowledged technological development of the Intoxilyzer 5000, the focus inherently shifts from the breath sample to the machine itself and its proper operation for the due process debate to be relevant. [D]ue process rights are not violated by denying them independent samples, since defendants still have sufficient means of raising a meaningful challenge to the test results.²

A careful review of the record shows nothing to support an assertion that the Intoxilyzer 50000-EN was not functioning properly immediately before and after Appellant's test. In fact, calibrations performed before and after Appellant's test show that the instrument was performing accurately. Further, criminalist Kevin Albrecht stated that the instrument was functioning properly. Thus, the judge in the evidentiary hearing after weighing this evidence, made the proper decision to deny Appellant's motion to suppress the breath test results.

¹ 175 Ariz. 348, 857 P.2d 400 (Ariz.App. 1993).

² Moss, 175 Ariz. at 352, 857 P.2d at 404.

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State ex rel. Collins v. Seidel³ provides a dual method for the admission of breathe test results:

The statutory method for introduction of breath test analysis, which permits admission of the test and its results with no expert testimony, is an alternative to the method of admission under the Rules of Evidence, which allows evidence based on scientific, technical or specialized knowledge. Both the state and a defendant may use either method in attempting to introduce such evidence and, if the evidence is admissible under either method, the evidence must be admitted.⁴

Consequently, the lower court correctly allowed the breath test evidence to be admitted through scientific foundation (the *Deason* method), pursuant to Rule 702 of the Arizona Rules of Evidence. Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Appellant's claim that the trial court's ruling on the motion to suppress was erroneous directly relates to the sufficiency of evidence offered at the hearing. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.⁵

All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.⁶ If conflicts in evidence exist, the

³ 142 Ariz. 587, 691 P.2d 678 (Ariz. 1984).

⁴ *Id.*, 142 Ariz. at 591, 691 P.2d at 682.

⁵ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

⁶ *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

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appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.⁷

An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁸ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁹ The Arizona Supreme Court has explained in State v. Tison¹⁰ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹¹

The record before this court is clearly contains evidence to support the trial judge's decision to deny Appellant's motion to suppress. Further, evidence and supporting case law exists to support the court's admission of breath test results, pursuant to Rule 702 of the Arizona Rules of Evidence.

IT IS THEREFORE ORDERED affirming the findings of guilt and sentences imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further, if any, and future proceedings.

⁷ Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁸ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

⁹ Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

¹⁰ SUPRA.

¹¹ Id. at 553, 633 P.2d at 362.